Court of Appeals Cause No. 69103-1-I

No. 89543-1

SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET l. BRISCOE,

Petitioner

v.

RANDALL LAMONICUS McWILLIAMS,

Respondent

And

LEVITICUS JADE McWILLIAMS,
ELIZABETH ANN ROWLAND, and VICTOR GREER,

Defendants

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Margaret Briscoe asks this court to accept review of the decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division I, decision filed in her appeal on August 26, 2013. Petitioner's timely Motion to Publish was denied on October 9, 2013. A copy of the decision is in the Appendix at pages A-1 through A-8 and a copy of the Order Denying the Motion to Publish is attached at page A-9.

Viewing itself constrained by what it asserted was the common law doctrine that only "the owner, keeper or harborer" can be liable for a dog's dangerous tendencies that result in harm to another, the Court of Appeals believed it was precluded from considering Petitioner's alternative theories of liability based upon agency/master-servant, premises liability, and negligent entrustment against Respondent Randall McWilliams, the possessor of the premises where the dog attack on Petitioner occurred. Petitioner seeks review of this decision.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' holding that only "owners, keepers or harborers" of dangerous dogs can be liable for dog bite attack conflict with the decision of Court of Appeals, Division II, in

Gorman v. Pierce County, 176 Wn.App. 63, ___P.3d ____ (2013)(Petition for Review Pending) holding that Pierce County was liable for a dog attack, and with Division I's decision in *Livingston v. City of Everett,* 50 Wn.App. 655, 751 P.2d 1199 (1988) holding the plaintiff was entitled to have a jury determine whether the City of Everett was liable for a dog attack? RAP 13.4(b)(2).

2. Does the Court of Appeals' holding that only "owners, keepers or harborers" of dangerous dogs can be liable for dog bite attacks misapply this Court's decisions in dog attack cases and thus abrogate a dog bite victim's access to justice under the well-established doctrines of agency/master-servant, premises liability, and negligent entrustment? RAP 13.4(b)(1).

3. In light of the public health implications of the significant increase in the incidence of and medical costs associated with dog bites, should this Court hold that one in the possession of land may be liable for an injury caused by a dog bite under established premises liability principles? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

The Court of Appeals, at pp. 2-3 of the slip opinion, accurately recited the salient facts noted in quotes below. Since the Court of Appeals affirmed on the basis that only "owners, keepers or harborers" can be liable

in Washington for a dog bite, some additional facts supportive of Petitioner's causes of action for respondeat superior (agency), premises liability, and negligent entrustment are also set forth:

"Randall McWilliams [Respondent] rented an apartment from his friend, Victor Greer, beginning in March 2009. The lease was on a month-to-month basis and prohibited pets. During the lease, his brother Levi would visit and bring Jersey, his pit bull. If other people were present at the apartment, Levi would ensure Jersey was locked either in one of the rooms or in the downstairs garage." (Slip. Op. 2.)

Randall knew that Jersey needed to be isolated when strangers were around. CP 90, 111. Randall knew that Levi and Jersey were pretty much inseparable. CP 102, 114. Randall and his brother Levi were close and, among other things, had previously lived together along with Jersey and Levi's girlfriend Elizabeth Rowland. CP 92, 99, 108, 120-121. Earlier in Randall's tenancy of the townhouse, Elizabeth had performed contract work there for Respondent five mornings a week, Levi would sometimes come over with Jersey, and Randall had no rule against Jersey being there. CP 110, 111.

"Greer decided to sell his apartment in early 2010, so Randall began the process of moving out. Greer listed the apartment with a realty company and informed Randall that real estate agents would have access to

the apartment via the lockbox installed on the front door. On July 14, 2010, Randall left for California. Randall informed Greer he would be out of the apartment by July 15, 2010. Randall hired Levi to clean the apartment and move some of Randall's items to their mother's house. Randall agreed to pay Levi $300 for the work." (Slip. Op. 2.)

In July 2010, Levi was homeless and staying on friends' couches and he had Jersey with him. CP 101. Randall knew his brother was homeless. CP 87, 113.

"On July 16, 2010, Randall called Levi to check in on the cleaning. According to Randall, Levi told him the cleaning would be completed by that evening. Randall testified at his deposition that "I presumed he was going to be done [by July 16]. I anticipated he'd probably have to go back and get some cleaning supplies, but the majority of the job was going to be done."3 [FN3 reference by the court to "Clerk's Papers at 96".] After speaking with Levi, Randall deposited the $300 into Elizabeth Rowland's (Levi's girlfriend's) account." (Slip. Op. 2.)

"That same day, July 16, Randall contacted Greer and informed him the apartment was clean and vacant. Greer then telephoned Margaret Briscoe, his aunt, to request that she visit the apartment the next day, July 17, to confirm that Randall had moved out. Randall did not know Greer requested Briscoe to come to the apartment on July 17." (Slip. Op. 3.)

"Levi had not finished cleaning by July 16. Levi was still at the apartment on July 17, with Jersey. On July 17, Levi left the apartment to get some cleaning supplies with Jersey loose in the apartment. Briscoe came to the apartment while Levi was out. When she entered, Jersey attacked her, injuring her legs." (Slip. Op. 3.)

When he heard of a dog attack on Briscoe at his apartment, Randall immediately knew the dog must have been Jersey. CP 97-8.

Briscoe sued Levi and Rowland (Jersey's owners), Randall, and Greer, the owner/landlord. CP 1. Briscoe voluntarily dismissed Greer. CP 172-3. Briscoe obtained orders of default against Levi and Rowland, who are judgment proof. CP 170-1, 175.

Briscoe's causes of action against Randall included respondeat superior (agency), premises liability, and negligent entrustment, as well as a claim for violation of the lease agreement as a third-party beneficiary. CP 4. Randall moved to dismiss all of the claims under CR 12(b)(6). CP 11-14. The court dismissed the third-party beneficiary claim. CP 42-3. Randall subsequently moved for summary judgment on the three remaining claims, arguing generally that only owners, keepers or harborers of a dog could be held liable for injuries. CP 48-50. He specifically argued that no Washington case had ever permitted a dog bite victim to recover based on

agency law. CP 49-50. The trial court granted the motion and dismissed all three claims. CP 167-9.

Because all claims had been resolved, the trial court entered final judgment. CP 174-78. Division I affirmed, citing several decisions of this Court:

> Under the longstanding common law rule announced in *Markwood* [*v. McBroom*, 110 Wash. 208, 188 Pac. 521 (1920)] and reiterated in *Frobig* and *Clemmons*, a plaintiff injured by an animal must seek recovery from the owner, keeper or harborer of that animal. The common law precludes Briscoe's alternative theories of liability.

Slip Op. 4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. The Decision of the Court of Appeals Is in Conflict with Two Other Decisions of the Court of Appeals.

(Issue 1)

The decision of Division I in the instant case conflicts with *Gorman v. Pierce County*, 176 Wn.App. 63, ___P.3d ____ (2013)(Petition for Review Pending), in which Division II recognized a duty of care owed by those (Pierce County) who are in the position of preventing foreseeable harm by a dog with dangerous propensities even though not the "owner, keeper or harborer." To the same effect as *Gorman* is Division I's own opinion in *Livingston v. City of Everett,* 50 Wn.App. 655, 751 P.2d 1199 (Div. I, 1988). Division I's decision in this case cannot be harmonized with

Gorman and *Livingston*, save on the ground that one who does not own, keep, or harbor a dog can be held liable in negligence for injuries, only if that defendant is a governmental entity. Immunizing private entities in factual circumstances where a state, county or municipality can be held liable establishes an irrational precedent that contravenes the premise of the Legislature's directive that governmental entities and private parties are liable to the same extent for their tortious conduct. RCW 4.92.090; RCW 4.96.010. The Court of Appeals decision conflicts with the *Gorman* and *Livingston* decisions. RAP 13.4(b)(2).

II. The Decision of the Court of Appeals Misapplies a Decision of the Supreme Court Thus Abrogating Petitioner's Access to Justice.

(Issue 2)

The Court of Appeals' holding that "a plaintiff injured by an animal must seek recovery from the owner, keeper or harborer of that animal" (Slip Op. at p. 8) misapplies this Court's precedent. RAP 13.4(b)(1). While this Court has limited the liability of a landlord for dog attacks occurring on leased premises, none of the decisions cited by the Court of Appeals stands for the proposition that *only* an owner, keeper or harborer can be held liable to the victim of a dog bite attack, particularly where, as here, liability is asserted under other well established principles of common law negligence.

This Court's "owner, keeper, or harborer" analysis traces its roots to the Court's 1920 decision in *Markwood v. McBroom*, 110 Wash. 208, 188 P. 521 (1920). The critical phrase in *Markwood* (110 Wash. at 211) that has been cited for the "common law" principle is as follows:

> At common law a person would not be liable for an injury resulting from the bite of a dog unless he was the owner, keeper, or harborer of the dog. *Decker v. Gammon,* 44 Me. 322, 69 Am. Dec. 99 (1857); *McClain v. Lewiston Interstate, etc., Ass'n,* 17 Idaho 63, 104 P. 1015, 25 L. R. A. (N. S.) 691, 20 Ann. Cas. 60 (1909).

An analysis of the cases relied upon by *Markwood*, and *Markwood* itself, will show that they are actually favorable to Petitioner's position.

McClain v. Lewiston Interstate, a 1909 opinion of the Idaho Supreme Court, supports Petitioner's position in the instant case. In *McClain* the plaintiff was riding a race horse at defendant Lewiston Interstate Fair and Racing Association's race track when a dog under the control of an individual defendant ran after the race horse, causing it to fall and injure the rider. A verdict in favor of the rider against the individual defendant who brought the dog to the racetrack and had control of it (a keeper or harborer) was affirmed. Additionally, the jury's verdict against the race track (the possessor of the premises where the injury occurred) was also affirmed, with the Supreme Court of Idaho stating:

> The fair association knew the dog went upon the fair grounds and took no steps to restrain the dog or see that he did not

> become a dangerous agency, but relied upon Norman Vollmer and his sister to take proper care and properly restrain the dog. In such case the association was responsible for the acts of Norman Vollmer. Under all of these circumstances we are satisfied that it was the duty of the fair association not to permit dogs or any other dangerous agencies to go upon the racetrack where the plaintiff had a right to presume safety; and that it was negligence on the part of the association to permit the dog to go unrestrained upon the fair grounds and the racetrack, and the jury were warranted in concluding that it was negligence, and that they were liable as well as the other defendant for the injury resulting from the acts of such dog.

17 Idaho at 97. If Petitioner Margaret Briscoe is substituted for "plaintiff" and Respondent Randall McWilliams is substituted for the "fair association" in the above quote, the statement perfectly describes the instant case.

Decker v. Gammon is an 1857 opinion of the Supreme Judicial Court of Maine and was a case where a horse owner sued a neighboring property owner whose horse got loose and came onto the plaintiff's property, injuring the plaintiff's horse. The case has an interesting historical recitation of the "three classes of cases in which the owners of animals are liable for injuries done by them" to property or persons. 44 Me. at 327. But the case says nothing about limiting liability in any other situation. The defendant owner in *Decker* was liable because his horse got loose and injured the plaintiff's horse on the plaintiff's property. 44 Me. at 329-30. The case only discussed and dealt with "owners" of an animal.

Markwood itself does not stand for the proposition that there can be no other theory or claim of liability for a dog bite against a person or entity other an "owner, keeper, or harborer." *Markwood* dealt with a claim against the receiver of the assets of a corporation for a dog attack that occurred on neighboring premises wherein the receiver had no knowledge of the dog or that it was being kept on the grounds of the company for which he was the receiver. The case was brought under a state statute and Spokane ordinance dealing with the liability of owners and keepers of dogs, and this Court found insufficient evidence against the receiver to uphold a verdict against him. The case did not deal with claims of liability based upon respondeat superior (agency), premises liability, or negligent entrustment such as were alleged in the instant case.

The other cases cited by the Court of Appeals similarly fail to support its holding that "the common law precludes Briscoe's alternative theories of liability." *Frobig v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994) and *Clemmons v. Fidler*, 58 Wn. App. 32, 791 P.2d 257 (Div. II, 1990) each dealt with a claim made against the landlord of the premises for the acts of a tenant.

In *Frobig*, 124 Wn.2d at 735, this Court stated:

> The rule in Washington is that the owner, keeper, or harborer of a dangerous or vicious animal is liable; the landlord of the owner, keeper, or harborer is not. *Clemmons v. Fidler*, 58 Wn.

> App. 32, 35-36, 791 P.2d 257, review denied, 115 Wn.2d 1019 (1990); *Markwood v. McBroom*, 110 Wash. 208, 211-12, 188 P. 521 (1920); *Shafer v. Beyers,* 26 Wn. App. 442, 446-447, 613 P.2d 554, review denied, 94 Wn.2d 1018 (1980). In short, liability flows from ownership or direct control. *Clemmons*, at 37; *Shafer*, at 446; see also RCW 16.08.040 (owner of dog liable for dog's attacks). (Emphasis added.)

Similarly in *Clemmons*, in response to the argument that the landlord could be liable if he had knowledge of the presence of a dangerous dog owned by a tenant, the Court of Appeals stated: "We disagree; the landlord's knowledge is immaterial. We hold that the common law rule applies: only the owner, keeper, or harborer of the dog is liable for such harm." 58 Wn.App at 34 (Emphasis added). The statement as to the "common law" is again in the context of a claim against a landlord. The court in the next paragraph cites *Markwood v. McBroom*, *supra*, for this proposition. *Id.* at 35. Had the *Frobig* and *Clemmons* courts held that only owners, keeper or harborers could ever be held liable for a dog bite, they would not have had to engage in any discussion whatsoever on the law governing a landlord's liability for the acts of a tenant, let alone such a lengthy and extensive analysis of same.

As did the Court of Appeals in this case, both *Frobig* and *Clemmons* cite *Markwood* as first announcing in Washington the common

law principle limiting dog bite liability to "owners, keepers, or harborers."[1] Except for the instant case, those claims were based solely on the defendant's status as landlord and regardless of whether the landlord knew of the presence of the dangerous animal or not. The landlords in those cases were clearly not the possessors who controlled the premises, nor did they play a role in creating the hazardous condition. Petitioner takes no exception to that rule as being the rule in Washington and accordingly dismissed the landlord, Victor Greer, as a defendant in the trial court. Here, the Respondent was not a landlord, he was the tenant in possession and control of the premises, and Levi McWilliams was not a tenant, he was employed by the Respondent, his brother. This is not a case of landlord liability for the negligence of a tenant.

Markwood was properly decided but does not support the proposition that no person or entity other than an "owner, keeper, or harborer" can be liable for a dog bite. Allowing Petitioner's claim to proceed against the Respondent, the possessor of the premises who is not the landlord, is consistent with that rule. *Markwood* is a case limited to its

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[1] *Shafer v. Beyers*, 26 Wn. App. 442, 446-447, 613 P.2d 554 (Div. I, review denied, 94 Wn.2d 1018 (1980)), also cited in the quote from *Frobig*, likewise cited *Markwood*. *Shafer* also involved the affirmance of dismissal of an owner/landlord who did not reside on the premises. And *Johnston v. Ohls*, 76 Wn.2d 398, 457 P.2d 194 (1969) was cited for the common law proposition in *Clemmons* (58 Wn.App at 35) but that was a case against the owner of the dog that ran in front of a motorcycle causing an accident.

specific facts – a receiver who had no knowledge, or reason to know, of an animal's dangerous propensities – and does not stand for the broad, sweeping proposition for which it is being cited.[2]

This misconstruction, if allowed to stand, results in this Petitioner losing her day in court where the instrumentality of her injury happened to be a dog. In other circumstances – if for example she were injured due to a slippery substance left on the floor by the Respondent's brother Levi when he did his cleaning work for the Respondent – there would be no question of liability under principles of agency. Or, as previously noted, *supra* at p. 4, the Respondent employed Elizabeth Rowland on earlier occasions to work for him at the premises, knowing that his brother Levi would visit her and bring the dog he knew to be dangerous; had Petitioner lawfully come to the Respondent's premises at that time and been attacked, under this ruling of the Court of Appeals, Petitioner would have no action against the Respondent!

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[2] Case law from other states uniformly imposes a duty on the person in control of premises to exercise a duty of care to invitees for animals present on the property. *See, e.g., Schrum v. Moskaluk*, 655 N.E.2d 561 (Ind. Ct, App. 1995); *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991) (citing *Hammond v. Allegrett*, 262 Ind. 82, 311 N.E.2d 821 (Ind. 1974); *Burrell,* 569 N.E.2d at 639-640 (citing Restatement (Second) of Torts § 343); *Langan v. Valerie Wilson Travel, Inc.*, 2008 U.S. Dist. Lexis 55323 (D.S.C. July 21, 2008); *Garrett v. Overland Garage & Parts, Inc.*, 882 S.W.2d 188, 190-192 (Mo. Ct. App. 1994); *Savory v. Hensick*, 143 S.W.3d 712, 715-717 (Mo. Ct. App. 2004). *See also Landings Association, Inc. v. Williams*, 309 Ga.App. 321, 325, 711 S.E.2d 294 (2011) (citing *Beard v. Fender*, 179 Ga.App. 465, 346 S.E.2d 901 (1986)).

To deprive injured victims from pursuing their tort remedies where the injury is caused by a dog, but not by any other instrumentality, is an anomalous departure from the duty of care owed by a person or entity in the position of the Respondent to those lawfully on the premises. Such a rule would grant an "avoid liability free card" only where a dog caused the injury. Such a result would ignore the time honored remedies of Anglo-Saxon jurisprudence found in the legal doctrines of agency/master-servant (respondeat superior), premises liability, and negligent entrustment.

In premises liability cases, Washington courts have found the existence of a specific and unreasonably dangerous condition in a wide variety of factual situations involving physical conditions, activities, naturally occurring hazards, etc.[3] Similarly, under the doctrine of respondeat superior, the Respondent can be liable for the negligent acts of his brother, who was in his employ when Petitioner was injured by the brother's conduct if within the scope or course of employment. *See, e.g., Dickinson v.*

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[3] *See, e.g., Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996) (naturally accumulated snow and ice); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1996) (fast flowing creek adjacent to a child's play area); *Pimentel v. Roundup Company*, 100 Wn.2d 39, 666 P.2d 888 (1983) (can of paint overhanging shelf fell on patron's foot); *Jarr v. Seeco Construction Co.*, 35 Wn.App. 324, 666 P.2d 392 (1983) (falling sheetrock injured business invitee at construction site); *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 374 P.2d 939 (1962) (banana peel on ground in supermarket); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010) (an invitee worked on premises where construction activity caused asbestos to be a regular presence at shipyard).

Edwards, 105 Wn.2d 457, 466, 716 P.2d 814 (1986). There is a factual issue to be determined by a jury even if the acts committed may not have been authorized by the employer.[4] And similarly, Washington has adopted the doctrine of negligent entrustment, based upon the Restatement (Second) of Torts.[5]

If Washington law provides an exception to these premises liability principles and limits liability for dog attacks to only those who are "owners, keepers, or harborers," regardless of the facts or other theories of liability, this Court should say so. If there is such a rule, and the only exception relates to governmental entities as in *Gorman*, *supra* and *Livingston*, *supra*, then as noted above, such a rule abrogates long-standing tort theories of negligence liability on the part of persons or entities. The duty owed by Pierce County and Everett to protect persons from a dangerous dog should not be viewed as different from the duty owed by a possessor of premises to keep the premises safe for persons lawfully thereon from any other risky

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[4] *See, e.g., Green v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958); *McNew v. Puget Sound Pulp & Timber co.*, 37 Wn.2d 495, 497, 224 P.2d 627 (1950); *Breedlove v. Stout*, 104 Wn.App. 67, 70, 14 P.3d 897 (2001) (citing *Strachan v. Kitsap County*, 27 Wn.App. 271, 616 P.2d 1251 (1980).

[5] *See, e.g., Kickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 925-926, 64 P.3d 1244 (2003) *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982). Restatement (Second) of Torts § 308 (1965) provides: "it is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. (Emphasis added).

instrumentality that is not a dog. The same would be true as to an employer/master or a negligent entrustor. Petitioner sees no logic to such a limit but if there is one, it should be set forth under a reasoned analysis by this Court and not be the result of application by *sub silentio* expansion of what this Court said and meant nearly one hundred years ago.

III. Liability For Dog Attacks Presents An Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

(Issue 3)

The Humane Society of the United States estimates that from 1970 to 2010, the number of dogs and cats in homes increased from 67 million to 164 million.[6] The number of dogs owned is estimated at 78.2 million with 46 percent of United States households estimated to own dogs.[7]

According to the Centers for Disease Control, dogs bite 4.5 million Americans each year, half of them children.[8] While the majority of dog bites do not require medical attention, in 2008 there were 316,300 emergency department (ED) and 9,500 hospital stays related to dog bites, representing a rate of 109.3 ED visits and 3.1 hospital stays per 100,000

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[6] "Pets by the Numbers", August 12, 2013, found at: http://www.humanesociety.org/issues/pet_overpopulation/facts/pet_ownership_statistics.html

[7] *Id.*

[8] *See* http://www.cdc.gov/homeandrecreationalsafety/dog-bites/index.html ("CDC").

people.[9] On average, every day of the year there were 866 ED visits and 26 hospitalizations related to dog bites.[10]

The trend in dog bite-related hospitalizations between 1993 and 2008 is troublesome, showing an 86.3 percent increase in dog-bite related hospital stays.[11] The rate increased by 55 percent over this 16-year period, from 2.0 to 3.1 per 100,000.[12]

The average cost of treatment has also increased dramatically. The average cost of a dog bite-related hospitalization was $18,200, about 50 percent higher than the cost of the average injury-related hospitalization ($12,100).[13] The average length of stay was 3.3 days, shorter than the average injury-related hospitalization of 5.5 days, but the average cost per day for a dog bite-related hospitalization was 2.5 times that of the average injury-related hospitalization ($5,500 per day versus $2,200).[14] The CDC estimated that 368,245 people were treated for dog-bite-related injuries in 2001, and the largest cohort of victims was children between the age of five

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[9] Laurel Holmquist, M.A. and Anne Elixhauser, Ph.D., "*Emergency Department Visits and Inpatient Stays Involving Dog Bites,* 2008, HCUP, Health Care Costs and Utilization Project, Statistic Brief #101, p. 11. November 2010, http://www.dogsbite.org/pdf/2008-ed-visits-inpatient-stays-dog-bites.pdf. at FN 3.
[10] Id.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

and nine.[15] The highest rates of dog bite-related ED visits were for children under 10 years old—199.3 visits per 100,000 for 5-9 year olds and 175 per 100,000 for children under 5.[16] The common principal diagnoses for dog bite-related hospitalizations included skin and subcutaneous tissue infections, open wounds of extremities, open wounds of head, neck and trunk, and fractures of upper limbs.[17] In 2012, more than 27,000 people underwent reconstructive surgery as a result of being bitten by dogs.[18]

The public interest is served when those in physical possession of premises can be found liable under appropriate facts. They are in the best position to prevent injury from dangerous animals and in the best position, through their homeowner's or tenant's insurance, to bear the cost for this increasingly serious problem.

F. CONCLUSION

This court should accept review of Division I's Decision for any one, or all, of three very good reasons: (1) the decision conflicts with two other Court of Appeals decisions that would immunize private parties while leaving governmental entities liable for breach of a duty relating to dog

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[15] CDC, "Nonfatal Dog Bites-Related Injuries Treated in Hospital Emergency Departments—United States 2001. "*Morbidity and Mortality Weekly Report*" 52 (July 4, 2003) 605.
[16] Holmquist, M.A. and Anne Elixhauser, *supra* at FN 3.
[17] *Id.*
[18] *See* CDC, *supra.* (Citing American Society of Plastic Surgeons, 2012 Plastic Surgery Statistics Report).

attacks that contravenes the legislative directive that government be liable for its torts the same as private parties; (2) the decision conflicts with and misconstrues this Court's early decisions relating to dog bite liability; and (3) the scope of liability for dog attacks is a matter of substantial public interest in light of the rapid growth in dog ownership and dog attacks in recent years.

RESPECTFULLY SUBMITTED this 7th day of November 2013.

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DECLARATION OF SERVICE

I, AJ Rei-Perrine, declare as follows: on this date, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

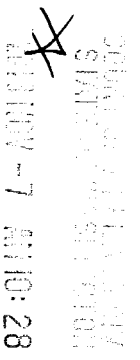
PETITIONER'S PETITION FOR REVIEW

Alice C. Brown c/o McLean & Associates 720 Olive Way, Suite 1600 Seattle, WA 98101	_x_ via WA Legal Messenger ___ via Facsimile ___ via E-mail ___ via US Mail
Pamela A. Okano Marilee C. Erickson c/o Reed McClure 1215 4th Ave #1700 Seattle, WA 98161	_x_ via WA Legal Messenger ___ via Facsimile ___ via E-mail ___ via US Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 7th day of November 2013.

AJ Rei-Perrine, WSBA #46159



APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARGARET L. BRISCOE, Appellant, v. RANDALL LAMONICUS MCWILLIAMS, Respondent, LEVITICUS JADE MCWILLIAMS, ELIZABETH ANN ROWLAND, and VICTOR GREER, Defendants.	)	No. 69103-1-I UNPUBLISHED OPINION FILED: August 26, 2013

VERELLEN, J. — Common law liability for dog bites flows only to the owner, harborer or keeper of a dog. Margaret Briscoe suffered injuries after being attacked by a dog left unattended in an apartment. Briscoe sued tenant Randall McWiliams, who had hired his brother Levi to clean the apartment.[1] Levi owned the dog and left it in the apartment while he went to obtain cleaning supplies. Briscoe alleges respondeat superior (agency),[2] premises liability, and negligent entrustment claims against Randall. Briscoe appeals the trial court's summary judgment dismissing her claims. Because

[1] We refer to the brothers by first names for ease of reference.

[2] Appellant refers to agency and respondeat superior interchangeably in her briefing.

Randall was not the owner, harborer or keeper of the dog, we affirm dismissal of Briscoe's claims.

FACTS

Randall McWilliams rented an apartment from his friend, Victor Greer, beginning in March 2009. The lease was on a month-to-month basis and prohibited pets. During the lease, his brother Levi would visit and bring Jersey, his pit bull. If other people were present at the apartment, Levi would ensure Jersey was locked either in one of the rooms or in the downstairs garage.

Greer decided to sell his apartment in early 2010, so Randall began the process of moving out. Greer listed the apartment with a realty company and informed Randall that real estate agents would have access to the apartment via the lockbox installed on the front door. On July 14, 2010, Randall left for California. Randall informed Greer he would be out of the apartment by July 15, 2010. Randall hired Levi to clean the apartment and move some of Randall's items to their mother's house. Randall agreed to pay Levi $300 for the work.

On July 16, 2010, Randall called Levi to check in on the cleaning. According to Randall, Levi told him the cleaning would be completed by that evening. Randall testified at his deposition that "I presumed he was going to be done [by July 16]. I anticipated he'd probably have to go back and get some cleaning supplies, but the majority of the job was going to be done."[3] After speaking with Levi, Randall deposited the $300 into Elizabeth Rowland's (Levi's girlfriend's) account.

[3] Clerk's Papers at 96.

That same day, July 16, Randall contacted Greer and informed him the apartment was clean and vacant. Greer then telephoned Margaret Briscoe, his aunt, to request that she visit the apartment the next day, July 17, to confirm that Randall had moved out. Randall did not know Greer requested Briscoe to come to the apartment on July 17.

Levi had not finished cleaning by July 16. Levi was still at the apartment on July 17, with Jersey. On July 17, Levi left the apartment to get some cleaning supplies with Jersey loose in the apartment. Briscoe came to the apartment while Levi was out. When she entered, Jersey attacked her, injuring her legs.

Briscoe sued Levi and Rowland (Jersey's owners), Randall, and Greer. Briscoe voluntarily dismissed Greer. Briscoe obtained default judgment against Levi and Rowland, but they are judgment proof and have no insurance.

Briscoe's causes of action against Randall included respondeat superior (agency), premises liability, and negligent entrustment, as well as a claim for violation of the lease agreement as a third-party beneficiary. Randall moved to dismiss all of the claims under CR 12(b)(6). The court dismissed the third-party beneficiary claim. Randall then moved for summary judgment on the three remaining claims, arguing generally that only owners, keepers or harborers of a dog could be held liable for injuries. He specifically argued that no Washington case had ever permitted a dog bite victim to recover based on agency law. The trial court granted the motion and dismissed all three claims. Because all claims had been resolved, the trial court entered final judgment. Briscoe appeals.

DISCUSSION

Briscoe argues the trial court erred in dismissing her claims against Randall, contending she should have the chance to argue her negligent entrustment, respondeat superior and premises liability claims to the jury.[4] We review de novo a trial court's decision on summary judgment, performing the same inquiry as the trial court.[5] We may affirm an order granting summary judgment on any basis supported by the record.[6]

Under longstanding Washington common law, only the owner, keeper or harborer of a dog is liable for injuries caused by the dog.[7] In 1920, our Supreme Court considered whether to overturn a verdict in favor of a plaintiff who had sued the receiver of the Washington Motion Picture Corporation for negligence when a dog kept on its property escaped and killed the plaintiff's young son.[8] One of the employees of the corporation owned the dog and was paying another employee to feed it.[9] The court

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[4] We reject Briscoe's contention that the trial court had already ruled on the viability of her liability theories when it denied Randall's CR 12(b)(6) motion. As Randall rightly argues, the trial court has the discretion to deny a motion to dismiss on a claim but then grant summary judgment on that same claim. Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1121 (10th Cir. 1979).

[5] Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. Id. Summary judgment is proper if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.; CR 56(c). If the nonmoving party fails to controvert material facts supporting the summary judgment motion, those facts are considered to be established. Cent. Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

[6] LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

[7] Under Washington's strict liability dog bite statute, RCW 16.08.040, only owners are liable for damages. Briscoe does not assert any cause of action under the statute against Randall.

[8] Markwood v. McBroom, 110 Wash. 208, 208-09, 188 P. 521 (1920).

[9] Id. at 209-10.

looked to the common law and reasoned that the receiver was plainly not the dog's owner or keeper.[10] The court also applied the following definition: "'Harboring' means protecting, and one who treats a dog as living at his house, and undertakes to control his actions, is the owner or harborer thereof, as affecting liability for injuries caused by it."[11] In concluding the receiver was not a harborer of the dog, the court noted the dog was not an asset of the corporation, the dog was not in the receiver's possession, and the receiver could not be charged with knowledge of the dog's existence.[12] Having determined the receiver was neither the owner, keeper or harborer of the dog, the court vacated the judgment, reasoning that "[a]t common law a person would not be liable for an injury resulting from the bite of a dog *unless* he was the owner, keeper, or harborer of the dog."[13]

Many decades later, in Frobig v. Gordon, the court considered whether the plaintiff, who had been mauled by a Bengal tiger, could recover not against the keeper of the tiger but against the keeper's landlords (the Branches).[14] Anne Gordon, the keeper of the tiger and the tenant, leased property from the Branches.[15] Gordon was in the business of providing wild animals for film and video projects.[16] Gordon had the tiger on her property for a project, and the tiger escaped during the filming of a

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[10] Id. at 211.

[11] Id.

[12] Id. at 211-12.

[13] Id.

[14] 124 Wn.2d 732, 881 P.2d 226 (1994).

[15] Id. at 733.

[16] Id.

commercial.[17] The tiger attacked Frobig, seriously wounding her.[18] The court considered whether the trial court had properly dismissed Frobig's action against the landlords for negligence and strict liability.[19]

The court grounded its analysis in the common law rule announced in Markwood v. McBroom, stating, "The rule in Washington is that the owner, keeper or harborer of a dangerous or vicious animal is liable; the landlord of the owner, keeper, or harborer is not."[20] The court then stated, "In short, liability flows from ownership or direct control."[21] The court rejected the viability of the plaintiff's claim against the landlords because a "landlord owes no greater duty to the invitees or guests of his tenant than he owes to the tenant himself."[22]

The court reasoned further that the landlords' prior knowledge of the tiger on the property had no significance because under Washington law, the "landlords would not be liable to the tenant for the tiger's attack so should not be liable to third parties for injuries inflicted by the animal."[23] The court concluded that "[t]he wild animals were Anne Gordon's alone, and under Washington law liability resulting from the ownership and management of those animals rests with Anne Gordon alone."[24] Therefore, the court foreclosed any actions against landlords for liability arising out the dangerous

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[17] Id. at 734.

[18] Id.

[19] Id. at 735.

[20] Id. (citing Markwood, 110 Wash. at 208-09).

[21] Id.

[22] Id.

[23] Id. at 737.

[24] Id.

animals owned, kept, or harbored by tenants.

In Clemmons v. Fidler, Division Two of this court declined to extend the common law rule to apply to landlords, even where the landlord knows the tenant has a dog with vicious tendencies.[25] There, the plaintiff sued the landlord for injuries to her young son under the theory that the landlord knew his tenants' dog was dangerous.[26] The court reasoned, "[T]he landlord's knowledge is immaterial. We hold that the common law rule applies: only the owner, keeper, or harborer of the dog is liable for such harm."[27] The court continued, "This rule is consistent with our case law, with our former criminal and present civil statutes on dogs, and with the analogous law governing landlord liability for defective conditions on leased premises."[28]

"Common law liability for injuries caused by vicious or dangerous dogs is based upon a form of strict liability. . . . Any injury caused by such an animal subjects the owner to prima facie liability without proof of negligence."[29] Issues of negligence and contributory negligence, fault and comparative fault therefore have no application.[30] The rationale rejecting landlord liability for a tenant's dog expressed in Clemmons and Frobig applies equally to Randall's liability for Levi's dog, regardless of whether Levi

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[25] 58 Wn. App. 32, 33, 791 P.2d 257 (1990); see also Frobig v. Gordan, 124 Wn.2d 732, 735, 881 P.2d 226 (1994) (citing Clemmons).

[26] Id. at 33-34.

[27] Id. at 34.

[28] Id. at 34-35; see also Shafter v. Beyers, 26 Wn. App. 442, 446-47, 613 P.2d 554 (1980) (court did not err in dismissing on summary judgment plaintiff's action against the owner of the premises where the dog in question was kept by a subtenant because neither the dog bite statute nor the common law allowed a plaintiff to recover against a landlord, where landlord was not the owner, keeper or harborer of the dog).

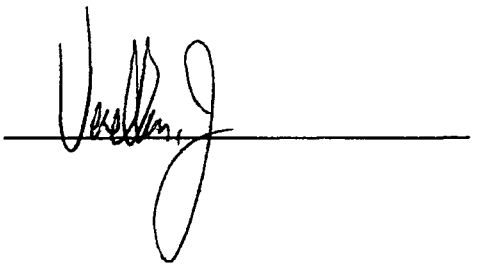
[29] Johnston v. Ohls, 76 Wn.2d 398, 400, 457 P.2d 194 (1969).

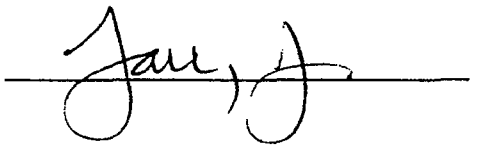
[30] Id. at 401.

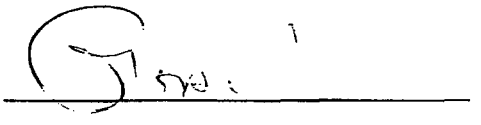
was Randall's agent (respondeat superior) or business invitee (premises liability theory). Nor does the narrowly drawn common law rule permit a claim for negligent entrustment. The common law restricts liability to the owner, keeper or harborer because they own or have direct control of the animal.[31]

There is no genuine issue of material fact that Randall was neither the owner, harborer, or keeper of Jersey. He had no direct control of the animal. Under the longstanding common law rule announced in Markwood, and reiterated in Frobig and Clemmons, a plaintiff injured by an animal must seek recovery from the owner, keeper or harborer of that animal. The common law precludes Briscoe's alternative theories of liability. Because Randall does not fall within the class of people subject to common law liability, we affirm dismissal of Briscoe's claims against him.[32]

WE CONCUR:







[31] Government agencies involved with animal control may face liability under the public duty doctrine, see, e.g., Gorman v. Pierce County, No. 42502-5-II, slip op. at 7-15 (Wash. Ct. App. Aug. 13, 2013); Livingston v. City of Everett, 50 Wn. App. 655, 658, 751 P.2d 1199 (1988), but that discrete theory of recovery does not conflict with the common law standard limiting liability to the owner, keeper or harborer of an animal.

[32] See Hackler v. Hackler, 37 Wn. App. 791, 794, 683 P.2d 241 (1984) (summary judgment is proper when, although some facts might be disputed, there are not material facts at issue under the legal principle that disposes of the controversy).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MARGARET L. BRISCOE, Appellant, v. RANDALL LAMONICUS MCWILLIAMS, Respondent, LEVITICUS JADE MCWILLIAMS, ELIZABETH ANN ROWLAND, and VICTOR GREER, Defendants.	)	No. 69103-1-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellant filed a motion to publish the court's opinion entered August 26, 2013. Upon the court's request, the respondent filed a response. The panel has considered the motion and response and determined the motion should be denied. Now therefore, it is hereby

ORDERED that appellant's motion to publish the opinion is denied.

Done this 9th day of October, 2013.

FOR THE PANEL: